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Summary record of the 2010th meeting

Topic:
Law of the non-navigational uses of international watercourses

Extract from the Yearbook of the International Law Commission:-
1987, vol. I

28. He preferred to take a less theoretical approach. The plain fact was that States had accepted provisions on notification and consultation in numerous watercourse treaties. The problem facing the Commission was to decide whether that duty could be generalized. As he saw it, recognition of the duty to notify and consult was necessary in order to give effect to the rules on equitable utilization and prevention of appreciable harm. Rules on notification and consultation would make it possible for a State to ascertain whether it was exceeding its equitable share of a watercourse. Otherwise, it would have to wait until the other State or States concerned made representations, by which time it might be too late: a dam or a new factory might already have been built.

29. Mr. FRANCIS said that, further to Mr. Bennouna's comments, it was pertinent to determine the nature of the draft convention the Commission was preparing. Was it a set of residuary rules? Secondly, it was necessary to take account of the greatly accelerated pace of progress in all fields, including technology, for the Commission's draft would have to stand the test of time. Allowance would have to be made for the fact that the principles embodied in it would be applied largely through bilateral treaties or restricted multilateral treaties, depending on the number of riparian States involved.

30. Lastly, it should be emphasized that the Commission was engaged in the task of both developing and codifying international law. Where it developed the law, it would have to ensure that the new rules were made effective.

31. The CHAIRMAN said that the meeting would rise to enable the Drafting Committee to meet.

The meeting rose at 11.15 a.m.

2010th MEETING

Friday, 5 June 1987, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/399 and Add.1 and 2,[1] A/CN.4/406 and Add.1 and 2,[2] A/CN.4/L.410, sect. G)

[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

CHAPTER III OF THE DRAFT:[3]

ARTICLE 11 (Notification concerning proposed uses)

ARTICLE 12 (Period for reply to notification)

ARTICLE 13 (Reply to notification: consultation and negotiation concerning proposed uses)

ARTICLE 14 (Effect of failure to comply with articles 11 to 13) *and*

ARTICLE 15 (Proposed uses of utmost urgency)[4] (*continued*)

1. Mr. CALERO RODRIGUES said that the importance of draft articles 11 to 15 went far beyond procedural considerations. As the Special Rapporteur pointed out in his third report, the "set of draft articles on procedural requirements" constituted the "centrepiece" of the report (A/CN.4/406 and Add.1 and 2, para. 7). In his second report, too, the Special Rapporteur had referred to "procedural requirements that are an indispensable adjunct to the general principle of equitable utilization" (A/CN.4/399 and Add.1 and 2, para. 188).

2. The procedural rules were intended to apply to the situation in which a State "contemplates a new use of an international watercourse which may cause appreciable harm to other States". Like the corresponding provisions submitted by the previous Special Rapporteur, Mr. Evensen, the draft articles under consideration provided for a scheme comprising notification, reply, time for reply, consultations, negotiations and, finally, settlement of disputes. Draft articles 11 to 15, however, also dealt with the consequences of objections raised in reply, with the consequences of failure to comply with the rules, and with the rights of States in cases of "utmost urgency". At the present stage, he proposed to deal with only three questions: first, the scope or nature of the situation to which the rules applied; secondly, the consequences of non-compliance with the rules; and, thirdly, the suspensive effects of the application of the procedural provisions, in other words the "standstill clause".

3. On the first question, the draft articles required "timely notice" to be given when a State contemplated a new use of an international watercourse that could cause "appreciable harm" to other States. The term "new use" had to be construed *lato sensu*, so as to cover modification of an existing use and uses by private persons in the State concerned.

4. Under draft article 9, which was before the Drafting Committee, uses or activities that might cause appreciable harm to the rights or interests of other watercourse States were prohibited, unless otherwise provided for in an agreement between the States concerned. Certain undesirable restrictions on uses then appeared

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[1] Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

[2] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

[3] The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook . . . 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

[4] For the texts, see 2001st meeting, para. 33.

in draft article 11, as a logical consequence of article 9 as currently drafted. Draft article 11 set out the procedure for dealing with a forbidden action; it specified the conditions to be fulfilled for action to be permitted—the conditions for allowable harm and for allowable risk of harm. The two concepts of allowable harm and allowable risk were given equal treatment in draft article 9, which prohibited both harm and risk of harm unless allowed by agreement. The first proposition was quite normal, but to prohibit risk of harm was much more questionable. There could be a small risk of great harm, a small risk of small harm, a great risk of small harm or a great risk of great harm, and obviously those four situations could not be treated equally, as they were in article 9. Article 9 should refer only to harm; then article 11 could treat harm and risk differently. The present strict provisions of draft article 11 would apply only to harm: when only risk was involved, States would be allowed more freedom. The rules relating to co-operation and communication would apply in either case.

5. The consequences of non-compliance with the procedural rules were set out in draft article 14, paragraph 3, which provided that the defaulting State "shall incur liability for any harm caused to other States by the new use, whether or not such harm is in violation of article [9]". That provision did not, in principle, have much meaning, since liability for harm would exist in any case; it would not flow from non-compliance with the procedural rules. Liability was the normal result of any activity which caused harm; it could not be regarded as a sanction for non-compliance.

6. As to the proviso "whether or not such harm is in violation of article [9]", the Special Rapporteur explained in his third report (A/CN.4/406 and Add.1 and 2), in paragraph (4) of his comments on draft article 14, that liability would exist "even if such harm would otherwise be allowable under article [9] as being a consequence of the notifying State's equitable utilization of the watercourse". But article 9, as drafted, did not appear to give any indication that harm would be allowable as a consequence of "equitable utilization". He was at a loss to understand how a use which actually caused harm could be considered an equitable use. The concept of allowable harm, in article 9, meant harm that was accepted by the affected State. If the procedure of co-operation provided for in the procedural articles was not followed, clearly there could be no agreement allowing the harm. It would therefore seem that, under article 14, paragraph 3, no particular consequences would follow from non-compliance with the procedures. He was not pronouncing on the question whether it was necessary or useful to provide some sanction for non-compliance, but paragraph 3 of article 14, as it stood, served no useful purpose.

7. The suspensive effects of the application of the procedural rules depended largely on the situations to which those rules applied. It was generally agreed that the suspensive effects should not last longer than necessary, but a clear rule on the point should be included in the draft.

8. The first reference to a suspensive effect was in draft article 12, paragraph 2, *in fine*, which provided that a notifying State "shall not initiate, or permit the initiation of, the proposed new use without the consent of the notified States", while the notified States were studying the notification. But nothing was said about the period of consultations and negotiations under paragraphs 2 and 3 of draft article 13; the question arose whether the suspensive effect would continue to apply during that period, and during the entire period in which a procedure for the settlement of disputes was engaged. That point should be clarified.

9. There were only two references in the draft articles to the possibility of initiating the contemplated use during the application of the procedural rules. The first was in draft article 14, paragraph 2, which provided that, if a notified State failed to reply to a notification "within a reasonable period", the notifying State could proceed with the initiation of the use. The second was in draft article 15, paragraph 1, where the contemplated use was "of the utmost urgency" as determined in good faith by the notifying State. The latter case, as explained by the Special Rapporteur in paragraph (1) of his comments on draft article 15, concerned "certain extraordinary situations involving public emergencies". Those two provisions, which applied in clearly defined situations, did not provide any answer to the basic question as to when the suspension ended.

10. The general thrust of the procedures set out in draft articles 11 to 15 was acceptable, although the drafting needed improvement to remove certain doubts and imprecisions. The essential issue was the determination of the situations to which the rules would apply. Some of those rules, such as the standstill clause and the clause on the settlement of disputes, would be unduly restrictive if applied to situations involving risk of harm without qualification, but they would not be so considered if they applied only to situations in which harm was certain or almost certain. The present understanding of the procedural provisions was that they applied to situations prohibited by article 9. Thus they dealt with forbidden situations, in which it was logical to require the agreement of the States concerned for the contemplated use to be initiated.

11. Although consistent with their own internal logic, the provisions under consideration would, in practice, create an impossible situation, in which a riparian State's utilization of a watercourse would be dependent on the will of another State having an interest in the question which was not comparable with its own. To avoid creating such an unbalanced situation, he suggested that article 9 should be redrafted to prohibit only the causing of harm, and that the procedural rules should be reconsidered. Those rules should be strict for application to forbidden situations, in which the contemplated use could be initiated only with the consent of the affected State. They should be far less strict for application to situations in which the contemplated use was not prohibited. In those situations, co-operation would be recommended.

12. Mr. OGISO said that he was in broad agreement with the remarks made by Mr. Bennouna at the previous

meeting, suggesting that the procedural rules should take the form of recommendations rather than obligatory norms. He found that suggestion very pertinent, at least as far as draft articles 11 to 14 were concerned. Draft article 15 was of rather a different character.

13. In his second report (A/CN.4/399 and Add.1 and 2, para. 59, *in fine*), the Special Rapporteur had referred as follows to the possibility of making recommendations concerning non-binding provisions:

> . . . the Special Rapporteur would venture to suggest that, at least initially, the Commission should concentrate on the elaboration of the basic legal principles operative in this area. Once that task has been accomplished, the Commission may wish to consider whether it would be advisable to go on to make recommendations concerning various forms of non-binding provisions, for example the establishment of institutional mechanisms for implementing the obligations provided for in the articles.

That passage, which showed the Special Rapporteur's understanding of the nature of a "framework agreement", suggested that it would not be altogether contrary to his approach if the Commission were to recommend that the procedural provisions of the draft should take the form of guidelines or recommendations, rather than principles or binding rules—even residual rules.

14. The "basic legal principles" referred to by the Special Rapporteur in that passage were the subject of articles 6 to 9, currently before the Drafting Committee. Those principles covered the following four obligations of watercourse States: (*a*) the obligation to consult and negotiate in good faith; (*b*) the obligation to utilize the international watercourse and to participate in its development and protection in a reasonable and equitable manner; (*c*) the obligation to take all relevant factors into account in determining whether a use was exercised in a reasonable and equitable manner; (*d*) the obligation to refrain from activities which might cause appreciable harm. Those four principles could be regarded either as general principles of customary international law, or as principles that could be derived from generally recognized international law. It was therefore appropriate that the Drafting Committee should consider them for inclusion in chapter II of the draft.

15. It was doubtful whether the provisions on notification procedures in draft articles 11 to 14 could be regarded as part of customary international law. Nor was it possible to deduce from treaty practice that there was a legal obligation for a watercourse State to notify other watercourse States of a contemplated new use in the absence of a specific agreement on the subject. Many interesting examples of the inclusion of such a requirement in watercourse treaties had been cited by the Special Rapporteur, but the presence of such provisions in a number of treaties did not prove that an obligation to notify already existed in customary international law. There was only a contractual obligation as set out in a particular agreement and binding only on the parties thereto.

16. In his third report, Mr. Schwebel had taken the position that a watercourse State was required "to give notice and to provide the necessary and relevant information and data";[5] but his own clear impression was that Mr. Schwebel had derived the notion of such an obligation from his proposed concept of an "international watercourse system". The obligation he postulated for the "system State" stood or fell by the concept of the "watercourse system". Yet it should be borne in mind that the "watercourse system" concept was now unlikely to be retained in the draft.

17. There was, of course, nothing wrong in making provision for a procedural requirement of notification as a contractual obligation. It was his feeling, however, that it was not possible to derive certain compulsory procedures from the general principles stated in articles 6 to 9. It would therefore be preferable to frame the articles on procedure in the form of recommendations; they would then become binding on watercourse States only when introduced into individual watercourse agreements.

18. Mr. Tomuschat (2009th meeting) had suggested that the opening words of draft article 11, "If a State contemplates a new use", had to be interpreted as meaning "If a State authorizes a new use". It could be argued, however, that once a State had authorized a certain project at a high level, it might be difficult to alter it because of a claim by another watercourse State that there was a possibility of harm.

19. Another question raised during the discussion was whether the concept of harm was to be limited to legal injury. In his third report (A/CN.4/406 and Add.1 and 2), in paragraph (5) of his comments on draft article 11, the Special Rapporteur offered the following explanation:

> While, technically speaking, a State suffers no legal injury unless it is deprived of its equitable share, the article is couched in terms of "appreciable harm" in order to facilitate a joint determination of whether any harm entailed by the new use would be wrongful (because the new use would exceed the notifying State's equitable share) or would have to be tolerated by potentially affected States (because the new use would not exceed the notifying State's equitable share).

He was not altogether convinced by that rather simplified explanation. There could be cases in which the new use was not wrongful, but still caused some adverse effect on other watercourse States, thereby calling for some compensatory or protective measures.

20. Draft article 12 referred to the period within which the notified State must respond to the notifying State. Alternative A of paragraph 1 proposed a "reasonable" period and alternative B a period of not less than six months. Actually, it would be difficult to justify a period of six months only on legal grounds; argument in favour of a shorter or a longer period might well be made. The choice could therefore be made only in the light of the circumstances of a particular international watercourse.

21. He shared the view that the obligations set out in chapter II of the draft would mean little if they were not accompanied by procedural provisions giving them concrete form. But those provisions would themselves be effective only if accepted by the watercourse States concerned and incorporated in watercourse agreements.

[5] *Yearbook . . . 1982*, vol. II (Part One), p. 104, document A/CN.4/348, para. 158.

22. In his view, therefore, draft articles 11 to 14 should be formulated as recommendations, which would become binding on watercourse States only when embodied in watercourse agreements. The provisions of those articles would thus take the form of guidelines or of a recommendation such as that on transfrontier pollution adopted by the Council of OECD in 1974 and cited by the Special Rapporteur in his third report (*ibid.*, para. 79).

23. Mr. McCAFFREY (Special Rapporteur) noted that Mr. Calero Rodrigues regarded paragraph 3 of draft article 14 as pointless because, in the case envisaged, liability would be incurred in any event. That was true, but in the law of international watercourses the legal wrong arose if one State was deprived of its equitable share in a particular watercourse, or if another State exceeded its share. Thus, if there was not sufficient water in the watercourse to satisfy all the States concerned and consequently a conflict arose, it became important to make an equitable allocation of the waters. Presumably, if an equitable balance was struck, neither State would achieve everything it wanted in terms of its own plans and needs. To that extent, therefore, some harm would have been done. To focus exclusively on harm, however, was to overlook the fact that the real legal injury arose when a State was deprived of its equitable share in cases where there was not enough water. The problem, therefore, was how to express the notion that, if a State failed to comply with the procedural rules, it should in some way be held responsible for actions for which it might not otherwise have been responsible. The only way to do that was to provide that a State might be liable for harm even if it was not deemed to have caused a legally recognized injury by exceeding its share. In order to understand the idea of equitable utilization it was essential to grasp that fundamental concept. Indeed, draft articles submitted by previous special rapporteurs had been criticized for failing to recognize the distinction. His intention in paragraph 3 of article 14 had been to add an extra tooth to the draft, as it were, but he remained at the Commission's disposal.

24. He agreed that the question of the standstill provision, or suspensive effect, required close attention. Mr. Reuter (2008th meeting) had dealt cogently with the question as to when such a provision might start to operate and had provided a possible basis for a solution to the problem. It was probably not a good idea, however, to wait until projects, programmes or uses were authorized, for by then it would be too late. It was necessary to find an expression that would be generally applicable to all legal systems and all States. He realized that the word "contemplates" was very vague; he had used it only for want of a better term and with an eye to flexibility. Any another term that could pin-point the stage in the planning process of a new project, programme or use that would be neither too early nor too late would have his support.

25. It was not so difficult to pin-point the end of a suspensive effect. His own view was that, unless otherwise agreed by the parties during the consultations and negotiations, such an effect should last for a reasonable period. It should not be so short as to allow a State simply to go through the motions of consultation, in order to let time run out so that it could then proceed with its project, although of course considerations of good faith were also involved. Nor should it necessarily last for the entire process of consultation, negotiation and settlement of a dispute, since that could take a long time.

26. With regard to Mr. Ogiso's point concerning procedural rules and whether they could form part of a set of recommendations and guidelines, he considered that it would be a very regressive step in the development of international watercourse law if the Commission were to recommend to the General Assembly that any procedural rules accompanying the fundamental principles of equitable utilization and the duty to avoid causing appreciable harm should be regarded as guidelines or recommendations. Procedural rules or requirements, as opposed to recommendations, were an indispensable adjunct to such principles. It might be asked why the rules could not be set out in a separate part of the draft for acceptance by States through agreement. The answer was that, where international watercourses and other subjects involving transmission of injurious substances through the medium of natural resources or the use of shared natural resources were concerned, procedures were of particular importance and had to be treated separately from procedures in other areas. In the case of such a general rule as that of equitable utilization, there had to be some procedural mechanism by which States could determine their compliance with the rule.

27. Mr. Ogiso had also raised the question whether, in the absence of agreement, procedural rules could be said to exist as part of customary international law. That was a very difficult question and all he could do as Special Rapporteur was to provide illustrations from the wealth of evidence that supported procedures as being rules of customary international law. The point was brought out in stark terms by article 3 of the Charter of Economic Rights and Duties of States, which he cited in his third report (A/CN.4/406 and Add.1 and 2, para. 51). The whole thrust of that provision was that the exploitation of shared natural resources, because of the very nature of such resources, required discussions in advance, not only to achieve optimum use, but also to avoid causing harm.

28. Mr. Ogiso had apparently inferred from the title of chapter II of the draft that only general principles were included in that chapter and that none were included in chapter III or perhaps even in succeeding chapters. Chapter III, however, also referred to general principles in its title and contained rules which, in his view, were essential for the proper implementation of the general principles of chapter II.

29. He would very much regret any action by the Commission tending to recognize a duty not to cause harm without providing States with guidance on how to discharge that duty. The many disputes throughout the world concerning the non-navigational uses of international watercourses could hardly be resolved without a set of procedural mechanisms for the implementation of the general rules set out in the draft.

30. Mr. REUTER said he fully agreed with the Special Rapporteur that procedural mechanisms which were not obligatory would be quite meaningless. The Commission's role was not to dispense fair words and advice to States, but to formulate rules of law. It mattered little if the Commission agreed on only a few rules, provided that they were obligatory. And it would be an illusion to think that it could confine itself to general principles, even though they were undoubtedly legal principles; it must adopt a minimum of obligatory mechanisms, which were not too heavy and were as precise as possible.

31. In his previous statement (2008th meeting), he had said that the Commission, when examining rules of procedure, would need to revert to the substantive rules, and Mr. Calero Rodrigues had just given a striking demonstration of that fact in connection with draft article 9, and of the distinction to be made between a risk of disturbance and certainty of disturbance. But that was far from being the only problem raised by article 9. For the Special Rapporteur distinguished—and that distinction was crucial—between harm resulting from a wrongful act and harm caused by disturbance of an existing situation or even of a legitimate expectation. But while the English terminology was sufficiently precise in that respect, French legal language, for example, was much less so. Hence it was extremely important to be quite clear on the meaning of the terms, in order to avoid any misunderstanding.

32. In articles 11 to 15, the Commission would have to settle other difficult questions relating to responsibility—for example, responsibility incurred by failure to notify—but it must first solve the fundamental problems, and to do so it must revert to the substantive rules, which were still very imprecise.

33. Mr. ARANGIO-RUIZ said he did not think that the Commission should get too involved in the meaning of the term "customary law". He would prefer the term "unwritten law", since he had doubts about the concept of custom as applied to international law. As he understood it, the role of the Commission was to draft conventions which consisted partly of customary or unwritten law, and partly of new law—in other words the progressive development of the law. It was for States to decide whether or not the conventions drafted by the Commission were acceptable to them.

34. The CHAIRMAN said that the meeting would rise to enable the Drafting Committee to meet.

The meeting rose at 11.35 a.m.

2011th MEETING

Tuesday, 9 June 1987, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/399 and Add.1 and 2,[1] A/CN.4/406 and Add.1 and 2,[2] A/CN.4/L.410, sect. G)

[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

CHAPTER III OF THE DRAFT:[3]

ARTICLE 11 (Notification concerning proposed uses)

ARTICLE 12 (Period for reply to notification)

ARTICLE 13 (Reply to notification: consultation and negotiation concerning proposed uses)

ARTICLE 14 (Effect of failure to comply with articles 11 to 13) *and*

ARTICLE 15 (Proposed uses of utmost urgency)[4] (*continued*)

1. Mr. GRAEFRATH said his initial impression that the Special Rapporteur's approach to co-operation was much too narrow was confirmed by draft articles 11 to 15. The Special Rapporteur regarded the rules laid down in those articles as procedural. On analysis, however, they proved to be a mixture of substantive rules on co-operation and implementation measures and rules that established or would lead to dispute-settlement procedures. Moreover, articles 11 to 15 focused on only one aspect of co-operation among watercourse States and sought to impose on the author State a strict procedure for which there was no basis in customary international law. State practice revealed a very different picture inasmuch as most bilateral and multilateral treaties covered a wide range of activities and procedures concerned with the promotion of co-operation in a variety of forms, including exchange of information, co-ordination of protective measures, common research projects, mutual assistance in times of danger, close co-operation among administrative bodies, establishment of joint commissions and even joint financing of programmes.

2. It was on the basis of such agreed co-operation that procedures operated effectively. Admittedly, procedures were a necessary element of co-operation, but the substance of co-operation could not be reduced to a set of procedural rules. Indeed, in many instances, it

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[2] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

[3] The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook . . . 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

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